No. 91-7814-CFY
Status: DECIDED

Title: Johnny Lee Mukes, Petitioner
v.
United States

Docketed:
March 9, 1992

Court: United States Court of Appeals for the Sixth Circuit

Counsel for petitioner: Waldman,Charles E.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Mar 9 1992	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Apr 20 1992		Waiver of right of respondent United States to respond filed.
4	Apr 23 1992		DISTRIBUTED. May 15, 1992
5	May 6 1992	P	Response requested -- BRW. (Due June 8, 1992)
7	Jun 8 1992		Order extending time to file response to petition until July 8, 1992.
8	Jul 8 1992		Brief of respondent United States in opposition filed.
9	Jul 16 1992		REDISTRIBUTED. September 28, 1992
11	Oct 5 1992		REDISTRIBUTED. October 9, 1992
13	Oct 13 1992		Petition DENIED. Dissenting opinion by Justice White with whom Justice Thomas joins. (Detached opinion.)

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ORIGINAL

91-7814

Supreme Court, U.S.
FILED
MAR 9 1992
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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

JOHNNY LEE MUKES, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

On Appeal from the Sixth Circuit United States Court of Appeals

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW the Petitioner, JOHNNY LEE MUKES, by and through Counsel of Record, Charles E. Waldman, Attorney at Law, and would state to this Honorable Court as follows:

1. Petitioner requests leave to proceed in forma pauperis pursuant to Supreme Court Rule 39.

2. Counsel for the Petitioner, Charles E. Waldman was appointed to represent the Petitioner by the Sixth Circuit Court of Appeals pursuant to the Criminal Justice Act of 1964, as amended. 18 U.S.C. Sec. 3006A.

3. Petitioner sought leave to proceed in forma pauperis in the Sixth Circuit Court of Appeals and leave was granted.

WHEREFORE, PREMISES CONSIDERED, PETITIONER PRAYS: that upon the hearing of this Motion, this Honorable Court shall grant the Petitioner leave to proceed in forma pauperis.

Respectfully Submitted,

Charles E. Waldman
Attorney for Petitioner
147 Jefferson, Suite 1102
Memphis, Tennessee 38103
(901) 521-9956

CERTIFICATE OF SERVICE

I, Charles E. Waldman, certify that I have mailed a copy of the foregoing Motion, first class postage, prepaid to Stuart J. Canale, Assistant United States District Attorney, Western District of Tennessee, Western Division, 1026 Federal Office Building, Memphis, Tennessee 38103, Counsel for the Respondent.

This 23rd day of March, 1992

Charles E. Waldman
147 Jefferson, Suite 1102
Memphis, Tennessee 38103
(901) 521 9956

QUESTION PRESENTED

Has a defendant been improperly convicted of using or carrying a firearm, during and in relation to any drug trafficking crime under 18 U.S.C. § 924 (c)(1), in a situation in which the defendant was convicted of a drug trafficking crime, a firearm was found in the same drawer with narcotics at the address searched by police pursuant to the warrant, but where there is no further evidence offered by the government as to the purpose, origin, or operation of the firearm?

LIST OF PARTIES

The parties to the procedings below were the petitioner Johnny Lee Mukes and the respondent, the United States of America.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JOHNNY LEE MUKES, Petitioner

v.

THE UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Johnny Lee Mukes respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circut, entered in the above-entitled procedings on January 10, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit has not been published and was not recommended for full-text publication. It is reprinted here in the Appendix hereto p. 19, infra.

The opinion of the United States District Court for the Western District of Tennessee, Western Division, has not been reported.

JURISDICTION

The judgment of the Court below (Appendix, hereto, p. 19, infra) was entered on January 10, 1992. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Second Amendment, United States Constitution, which provides:

A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

2. The Fifth Amendment, United States Constitution, which provides:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put into jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation.

3. 21 U.S.C. § 841(a)(1), which provides:

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense or possess with intent to manufacture, distribute or dispense, a controlled

substance.

4. 18 U.S.C. § 924(c), which provides:

(1) Whoever, during, and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler, to imprisonment to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

(2) For purposes of this section, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(5) 18 U.S.C. § 922(g), which provides:

It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien, is illegally or unlawfully in

the United States;

(6) who has been discharged from the Armed Forces under dishonorable conditions; or

(7) who, having been a citizen of the United States, has renounced his citizenship;

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

A. Course of Proceedings in the Case now before this Court

A federal grand jury returned a three-count indictment against the petitioner. Count 1 charged him with violation of 21 U.S.C. § 841(a)(1), possession with intent to distribute a schedule II controlled substance. Count 2 charged the petitioner with violation of 18 U.S.C. § 924(c), using or carrying a firearm during, and in relation to, a drug trafficking crime. Count 3 charged the petitioner with violation of 18 U.S.C. § 922(g), possessing, as a convicted felon, any firearm in or affecting commerce.

The petitioner pleaded not guilty on March 8, 1990. The trial began on June 5, 1990. The jury deliberated the case the following day and found the petitioner guilty on all three charges.

On August 9, 1990, the court sentenced the petitioner to 240 months on Counts One, Two, and Three, and gave three years supervised release with a $150.00 special assignment. On September 27, 1990 an amendment was entered wherein the petitioner received 180 months for Count One, 60 months on Count Two to run consecutively with Count One, and 180 months on Count Three to run concurrently with Count One.

On October 9, 1990, the petitioner filed his notice of appeal. The central issue of the appeal turned on the application of 18 U.S.C. § 924(c)(1) which made it a separate felony to use or carry a firearm in relation to and during a drug trafficking crime. Petitioner pointed out that some circuits had construed the provision of using a firearm narrowly, holding that a defendant could not be convicted of 18 U.S.C. § 924(c)(1) unless there was evidence of an underlying relationship between the firearm in question and the drug trafficking or other crime that the statute demands before a defendant can be convicted under this statutory provision. In the petitioner's case there was no such evidence of any such underlying relationship except for the physical proximity of the firearms and the cocaine.

The Court of Appeals for the Sixth Circuit issued its decision in January 10, 1992. It stated that the precedent of

the Sixth Circuit supported the "drug fortress" theory, which holds that if it reasonable appears that the firearms in question are being used to protect the drugs or facilitate the drug transaction in question, then the firearms should be considered being used in relation to the crime of drug trafficking. The Court of Appeals, in adhering to this interpretation, relied more on precedent than on legislative history or the constitutional rights afforded to citizens in the protection of life and liberty. The Court of Appeals noted the conflict between its interpretation of 924(c)(1) and that of other circuits, but felt bound to follow its own precedent unless and until directed by the United States Supreme Court or Congress.

B. Relevant Facts Concerning the Underlying Conviction

On September 26, 1989, police obtained a search warrant for cocaine and entered a house in Memphis wherein the petitioner was found ironing trousers on the floor of a rear bedroom. The Memphis law-enforcement authorities escorted the petitioner out of the bedroom to the living room and proceeded to search the drawer of a bedside nightstand, whereupon they discovered baggies containing what was later confirmed to be cocaine. Police also discovered two firearms, a Derringer .38 pistol and a small .25 automatic, the second unloaded. Neither of the firearms had been registered and one was later found to be stolen. The petitioner was alone in the house when the police arrived but did not reside

at the house.

REASONS FOR GRANTING THE WRIT

A defendant has been improperly convicted of using or carrying a firearm, during and in relation to a drug trafficking offense, under 18 U.S.C. § 924(c)(1) in a situation in which the defendant was convicted of a drug trafficking crime, two firearms was found in the same drawer as were the relevant narcotics at the house in which the defendant was found, because the use or carrying of the firearms in question for the purpose of drug trafficking has not been proven by the government.

The Sixth Circuit has invited direction as to the interpretation of 18 U.S.C. § 924(c)(1) (Supp. 1989). The statute, in relevant part, states, ...whoever, during, and in relation to any...drug trafficking crime...uses or carries a firearm, shall in addition to the punishment provided for such crime...be sentenced to imprisonment for five years. Hitherto, there has been no unanimity in the various Circuits' interpretation of the phrase, "uses or carries".

a. Various Interpretations of the phrase "uses or carries."

Then-Judge Clarence Thomas, in *U.S. v. Long*, 905 F.2d 1572 (D.C. Cir. 1990), summed up the position of the District of Columbia Circuit. In *Long*, the court considered the applicability of 18 U.S.C. § 924(c)(1) in a similar factual situation in which law-enforcement authorities, supported by a search warrant, discovered an unloaded handgun between sofa cushions and cocaine in various parts of the apartment, along with the defendant who was present, but who did not reside at the apartment. Then-Judge-Thomas, writing for the court, overturned the jury's conviction of the defendant on 18 U.S.C. § 924 (c)(1), stating that, in order to convict, evidence must be offered that the defendant actually or constructively possessed the firearm. *Id.* at 1578. The court in *Long* was particularly troubled that a conviction in this situation for "use" of the gun in question would be an indication that the word "use" had no clear boundaries. *Id.* at 1577.

Long is merely the last of a chain of cases which speak to the District of Columbia Circuit's relatively conservative interpretation of the phrase "uses or carries", for purposes of Title 18, U.S.C. § 924(c)(1). In *United States v. Evans*, 888 F.2d 891 (D.C. Cir. 1989), the court upheld the conviction based on the applicable statute but counseled that "the mere presence of a gun near the commission of the felony may not be sufficient to show that the gun was carried in relation to that felony"

The position of the Second Circuit Court of Appeals is consistent with the District of Columbia Circuit. In *United States v. Feliz-Cordero*, 859 F.2d 250 (2d Cir. 1988), the court reversed the conviction of the defendant for violation of 18 U.S.C. § 924(c)(1). Examining the legislative history of the statute, the court in *Feliz-Cordero* found that in order to fall under the provision of "uses" in 924(c)(1), the state had to demonstrate that the possessor intended to have the firearm located in a place that would allow for use during a transaction. *Id.* at 254. The court also held that mere possession of a gun by a drug trafficker to be insufficient for conviction, and that the state was required to demonstrate an association between the firearm and the primary crime. *Id.* The court found that a loaded firearm in a dresser drawer was insufficient grounds for conviction under 18 U.S.C. § 924(c)(1). *Id.* The court emphasized that the defendant could not be convicted of carrying a firearm, also prohibited under the statute, because there was no proof that the firearm was within reach of the defendant during the commission. *Id.* at 253-54.

The Eighth Circuit Court of Appeals, in *United States v. Duke*, 940 F.2d 1113 (8th Cir. 1991) adopted an approach that, like the interpretations of the District of Columbia and Second Circuits, significantly limited a jury's discretion in finding a defendant guilty of 924(c)(1). The court stated that, in order to prove guilt, the relevant firearm must be an integral part of the defendant's undertaking and must, by its availability,

increase the success of the criminal undertaking. *Id.* at 1118. The court in *Duke* acknowledged that, because firearms are there for the objective of terror and intimidation, guns that are found at drug houses which resemble armed fortresses could satisfy the standard set out by the court. *Id.* at 1119. In *Duke*, the court did find that the defendant's house resembled such a fortress because of a chain-link fence, surveillance cameras, scanners, an electronically-controlled gate, guard dogs, and periods in which large amounts of narcotics and cash were kept in the house. *Id.* In the instant case, there is no evidence whatsoever that the house that the petitioner was visiting at represented such a fortress.

The position of the Sixth Circuit Court of Appeals markedly contrasts with the positions of the District of Columbia, Second, and Eighth Circuits. The Sixth Circuit Court of Appeals in *United States v. Acosta-Cazares*, 878 F.2d 945 (6th Cir. 1989) determined that 18 § U.S.C. 924(c)(1) should be broadly construed. It is not necessary, according to the court, that ownership or actual possession be proven. *Id.* at 952. In *United States v. Henry*, 878 F.2d 937, 944 (6th Cir. 1989), the court held that , if it "reasonably appears" that the weapons found on the premises are controlled by the defendant and are meant to be used to protect or deal in controlled substances, then the defendant is guilty under 18 U.S.C. § 924(c)(1). Actual possession is not required, mere constructive possession is sufficient.

In the United States v. Bronough, 895 F.2d 247 (6th Cir. 1990), the defendant was charged with using a firearm in connection with an extensive cocaine-related operation. The gun in question was not even found and the defendant was not charged with any drug offenses. But the court held that the defendant, by pleading guilty to a single charge of obtaining a firearm by making a false statement, had admitted that the gun existed. *Id.* at 251. Moreover, there was sufficient evidence, according to the Court of Appeals, that the defendant took the gun into the relevant crack house. *Id.* at 250. With this evidence, and with very little else, the court upheld the defendant's conviction, although it admitted that some might consider it "anomalous that a defendant can receive a five-fold increase in his sentence because a preponderance of the evidence indicates he is guilty of an uncharged crime." *Id.* at 251.

In Bronaugh, however, Circuit Judge Wellford dissented, wisely counseling that the (uncharged) drug accusations were not demonstrated, even by a preponderance of the evidence, to be related to the single weapon specified in the indictment. *Id.* at 253-54 (Wellford, J., dissenting). Judge Wellford opined that unless the two activities were clearly related, the defendant should not be convicted of using or carrying a firearm in relation to a drug-trafficking offense. *Id.* at 254 (Wellford, J., dissenting). Judge Wellford's dissenting opinion is consistent with the holdings of the District of Columbia Circuit, the Second Circuit, and the Eighth Circuit, and should be binding

precedent in all federal courts.

b. The Fifth Amendment and Interpretation of 18 U.S.C. § 924(c)(1).

The conservative application of the District of Columbia, Second, and Eighth Circuits is more consistent with the intent of the Fifth Amendment. To hold a defendant guilty of carrying or using a firearm that may not even be his, in an house or apartment that he may not even reside in, because of an element as routine as the reasonable appearance of constructive possession, is to fall far short of the usual standard of proof in criminal cases, of proof beyond a reasonable doubt. Indeed, the standard adopted in the fortress analogy theory even falls short of the "clear and convincing evidence" standard. The low burden that the Sixth Circuit requires of the State greatly increases the possibility that a defendant will serve imprisonment for five additional years for a crime that he/she did not commit.

The Court of Appeals for the District of Columbia, in United States v. Bruce, 939 F.2d 1053 (D.C. Cir. 1991) cited by the Sixth Circuit Court of Appeals in the present case, pointed out that possession of a drug with intent to distribute it, is, in some ways, a passive crime. The court in the present case,

although agreeing with this statement, states that it is, nonetheless, analytically possible to use a gun in relation to this passive crime before the distribution is achieved. As an example, the court mentions that a defendant who possesses a controlled substance and fires at an individual attempting to deprive the defendant of narcotics possession, has violated 18 U.S.C. § 924 (c)(1). But this example is highly distinguishable from the situation at hand; indeed, the distinction emphasizes why the Sixth Circuit's approach is inconsistent with the Fifth Amendment. Shooting at someone is an active crime, even if the underlying crime (possession of a controlled substance with intent to distribute) is not. In the situation at hand, both the underlying crime (possession with intent to distribute) and the instant accusation (using a firearm by having it in the house) are passive acts. These two charges are, therefore, dangerously easy to convict without establishing sufficient evidence. This is why it is necessary to prove the nexus between § 841(a)(1) and § 924(c)(1) beyond a reasonable doubt, before conviction. The drug-fortress analogy clearly violates the guarantee of affective safeguards to buttress the citizen's right to liberty.

c. The legislative history of 18 U.S.C. § 924(c)(1).

The legislative history of the present 18 U.S.C. 924(c)(1) further clarifies the fact that the approach of the District of

Columbia Court of Appeals, the Eighth Circuit Court of Appeals and the Second Circuit Court of Appeals is the better approach which should be followed by the Sixth Circuit. The United States Congress, in fact, revised 18 U.S.C. § 924(c)(1) to demonstrate that conviction required more than simple possession of a firearm. Conviction could only be justified if it could be found that the defendant had intent to use the firearm if a contingency arose or to make an escape. (S. Rep. No. 225, 98th Cong. & Admin. News 3182, 3492 n.10).

Certainly, the drug fortress analogy falls far short of this explicit goal of 941(c)(1).

The obvious purpose for the statute is to prevent the violence that frequently accompanies drug transactions. But the overly-broad interpretation that the Sixth Circuit has given to the legislative intent actually gives the law the opposite effect. To the degree a dealer of controlled substances is aware of the statute (if he/she is not aware of the statute, it will achieve no purpose whatsoever), he/she will reason that, the presence of a roommate's firearm, or that of a social host (in whose house a guest is residing, either temporarily or permanently), will make him/her guilty under 924(c)(1). He/she will conclude, therefore, that there is no additional risk in deliberately using a gun to achieve an illegal transaction.

d. Policy consideration in interpretation of Title 18 U.S.C.

§ 924(c)(1).

There are other reasons for rejecting the Sixth Circuit's approach, reasons oriented to policy considerations. Prison overcrowding may very likely be the single greatest obstacle to the effective rehabilitation and/or successful deterrence of obvious criminals. To put a defendant in prison for five additional years because a gun was found on premises that he may not even have occupied would fill the already too-full prisons with possible violators while necessarily freeing inmates who are definitely guilty of active and serious offenses--therefore increasing, rather than decreasing both the danger and the cost to the law-abiding taxpaying community.

e. The Second Amendment and Title 18 U.S.C. § 924 (c)(1).

There is one more compelling justification to adopt the reasoning of the Second, Eighth, and District of Columbia Circuits' interpretation of §24(c)(1). There is vigorous and animated debate about the meaning of the Second Amendment -- the amendment guaranteeing the right to "keep and bear arms." All parties to the discussion agree, however, that the Second Amendment guarantees the right to possess firearms in furtherance of militia purposes. The broad interpretation of 18 U.S.C. § 924 (c)(1) given by the Sixth Circuit would act as a deterrence to

those families, a member of which serves in the National Guard. How many guardsmen will feel rewarded by such service if a serviceman's or guardsman's relative/guest/roommate was sentenced to an additional half a decade because the serviceman's firearm was found on the premises of the home along with the defendant's controlled substance? The fortress analogy, however, lends itself to such abuse because of its breadth.

CONCLUSION

For these reasons, the petition for certiorari should be granted. The position taken by the Sixth Circuit on the interpretation of Title 18, U.S.C. § 924 (c)(1) is overly broad and allows for imprisonment of a defendant on an unsubstantiated charge. As such it violates the Fifth Amendment of the United States Constitution which guarantees a person's liberty unless revoked with sufficient due process. Moreover, it impedes the effectiveness of the Second Amendment by discouraging individuals from carrying firearms, even for legitimate purposes such as service in a militia. Additionally, it encourages an unwise policy which will further promote the already serious problem of prison overcrowding. Finally, the Sixth Circuit Court of Appeals' interpretation of the legislation contradicts the legislative history and the purpose of Title 18, U.S.C. §

924(c)(1).

Respectfully submitted,

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FILED
JAN 10 1992
LEONARD GREEN, Clerk

NO. 90-6300

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHNNY LEE MUKES,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

Decided and Filed

BEFORE: **NELSON** and **SUHRHEINRICH**, Circuit Judges, and **ENGEL**, Senior Circuit Judge.

PER CURIAM. The main issue in this appeal turns on the district court's application of 18 U.S.C. § 924(c)(1). That statute provides as follows:

> "Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years . . . ."

The defendant was convicted of, among other things, possessing cocaine with intent to distribute it. "During and in relation to" this drug trafficking crime, the jury found, the defendant "use[d] or carrie[d] a firearm;" on the strength of this finding, which was based on the presence of two handguns in a drawer where the defendant kept his supply of cocaine, the district court imposed an additional five year prison sentence pursuant to the provision quoted above.

Inviting us to reject the "broad" interpretation we have placed on § 924(c) in cases such as *United States v. Henry*, 878 F.2d 937 (6th Cir. 1989), *United States v. Acosta-Cazares*, 878 F.2d 945 (6th Cir.), *cert. denied*, 493 U.S. 899 (1989), and *United States v. Bronaugh*, 895 F.2d 247 (6th Cir. 1990), the defendant urges us to hold as a matter of law that the evidence in the instant case was not sufficient to establish a

"nexus" between the firearms and the drug activity. Although the defendant's argument has some support in case law from other circuits, we do not find it persuasive; we shall affirm the district court's judgment in all respects.

I

Pursuant to a warrant, officers from the organized crime unit of the local police department searched a house occupied by the defendant in Memphis, Tennessee. They found the defendant on the floor of a rear bedroom, where he appeared to have been doing some ironing. A search of the closed top drawer of a nightstand in the bedroom disclosed two plastic bags containing what proved to be 32.9 grams of cocaine. The officers asked the defendant where the cocaine came from, and he said that it had been brought to him the night before.

In the same drawer where the defendant had stashed the cocaine the officers found a loaded .38 caliber derringer and an unloaded .25 caliber automatic pistol. Neither of the firearms had been registered, it developed, and one of them turned out to have been stolen.

A federal grand jury returned a three count indictment against the defendant. Count 1 charged him with possession of the 32.9 grams of cocaine with intent to distribute it, a violation of 21 U.S.C. § 841(a)(1). Count 2 charged that during and relation to the foregoing offense, the defendant carried and used the .38 caliber derringer and the .25 caliber pistol in violation of 18 U.S.C. § 924(c). Count 3 charged the defendant with having been convicted of a series of felonies and with possessing the firearms in violation of 18 U.S.C. § 922(g), a statute that makes it unlawful for a convicted felon to possess any firearm "in or affecting commerce . . . ."

A jury found the defendant guilty on all three counts. The trial court sentenced him to imprisonment for concurrent terms of 180 months on Counts 1 and 3. As to

Count 2, the court imposed a consecutive sentence of 60 months. The defendant perfected a timely appeal.

II

> "In cases involving firearms found on premises under the control of a drug offense offender, the courts have developed a 'fortress analogy' theory, which holds that if it reasonably appears that the firearms found on the premises controlled or owned by a defendant and in his actual or constructive possession are to be used to protect the drugs or otherwise facilitate a drug transaction, then such firearms are used 'during and in relation to' a drug trafficking crime." *United States v. Henry*, 878 F.2d 937, 944 (6th Cir. 1989), citing *United States v. Matra*, 841 F.2d 837, 843 (8th Cir. 1988), and *United States v. LaGuardia*, 774 F.2d 317, 321 (8th Cir. 1985). Accord *United States v. Head*, 927 F.2d 1361, 1366 (6th Cir.), *cert. denied*, 112 S. Ct. 144 (1991).

Under *Henry* and the Sixth Circuit cases that have followed it, it seems to us that a rational jury could have concluded that the defendant's drugs and the guns were being kept in the same place to facilitate the protection of the former by the latter.

It is true, as the Court of Appeals for the District of Columbia Circuit pointed out in *United States v. Bruce*, 939 F.2d 1053, 1055 (D.C. Cir. 1991), that possession of a drug with intent to distribute it in the future "is in a sense a passive crime . . . ." Surely however, it is not analytically impossible for someone to use a gun in relation to the passive possession of drugs before the drugs are distributed. If a person who is in possession of drugs uses a gun to shoot someone who attempts to deprive him of possession, for example, such a use unquestionably comes within 18 U.S.C. § 924(c)(1). It is well established, moreover, that one can use a gun without displaying it; a drug dealer who keeps a loaded weapon with his drugs for the purpose of protecting his inventory is "using" the gun in relation to his drug crime regardless of whether he has occasion to brandish the weapon or fire it. See *Matra*, 841 F.2d at 842-43, and the cases there cited. As we said in *Head*, 927 F.2d at 1366, quoting *Acosta-Cazares*, 878 F.2d at 952, "[t]he terms 'uses' and 'carries,' in Section 924(c)(1), 'should be construed broadly

to cover the gamut of situations where drug traffickers have ready access to weapons with which they secure or enforce their transactions.'"

The Court of Appeals for the Second Circuit pointed out in *United States v. Feliz-Cordero*, 859 F.2d 250, 254 (2d Cir. 1988), that "section 924(c) requires more than mere possession of a firearm. Rather, there must be some relation or connection between the firearm and the underlying crime." But notwithstanding the "frequent connection between firearms and narcotics trafficking," *id.*, the *Feliz-Cordero* court held that the necessary connection could not be inferred from the presence of a loaded .38 caliber Smith and Wesson revolver in the drawer of a dresser located in an apartment that also contained cocaine, drug records, $11,000 in cash, a beeper, and extra rounds of ammunition. We have noted elsewhere that this holding is difficult to reconcile with our circuit precedent. *United States v. Jackson*, No. 90-1609, 1991 U.S. App LEXIS 1757, at *17 (6th Cir. Feb. 1, 1991). Insofar as there is a conflict, of course, and unless the Supreme Court or Congress should instruct us otherwise, we must follow our own precedents.

III

At the time when it was discovered in the nightstand drawer, the loaded .38 caliber derringer had its barrel secured in place by a bolt with a nut on the end. (The bolt served as a substitute for a latch mechanism that had been removed.) The gun was capable of being fired, and there was testimony that an officer had test fired it with the bolt in place.

At the time when it was introduced in evidence at the trial, the derringer no longer had the bolt and nut in place. The defendant argues that without the bolt and nut, the derringer was not a "firearm" because it might have misfired or exploded if someone had tried to shoot it in this condition. The defendant also argues that without

the bolt and nut, the derringer would have been "less accessible to a person intending to use it."

These arguments border on the frivolous. The bolt and nut were unquestionably in place when the weapon was found, and the weapon was unquestionably loaded and capable of being fired at that time. The fact that removal of the bolt might have made it more dangerous for someone to fire the weapon hardly means that what the officers found in the nightstand of the defendant's bedroom was not a firearm. The derringer was obviously a firearm, and we do not believe that it was unduly prejudicial for the jury to be allowed to see the gun without the bolt; the testimony made it very clear that the bolt was merely a safety device.

Although the defendant was the only person found in the house, he argues that there was no proof that he was in actual or constructive possession of the room in which he was found or of the weapons in the nightstand drawer. We reject these arguments as well; the evidence must be viewed in the light most favorable to the government, and the government is entitled to the benefit of all favorable inferences that may reasonably be drawn from the evidence. *United States v. Tilton*, 714 F.2d 642, 645 (6th Cir. 1983). Under these principles, the jury was entitled to find that the defendant was in control of the room and its contents, just as it was entitled to find that the weapons were being kept in the nightstand drawer to help protect the drugs that had been delivered to the defendant the night before.

On the basis of what has already been said, finally, the conviction under 18 U.S.C. § 922(g) must be upheld; it is undisputed that the defendant had previously been convicted of a series of felonies, and if he "used" a firearm under § 924(c), he "possessed" the firearm under § 922(g).

AFFIRMED.

ISSUED AS MANDATE: 2/3/92
COSTS: No Costs
FILING FEE . . . . . $
PRINTING . . . . . $
TOTAL . . . . . $

A TRUE COPY
Attest:
LEONARD GREEN, Clerk
By Diane Schaub
Deputy Clerk

CERTIFICATE OF SERVICE

I, Charles E. Waldman, a member of the Sixth Circuit, appointed to represent the petitioner pursuant to the Criminal Justice Act, hereby certify that on this 7th day of March, 1992, three copies of the petition of the writ of Certiorari in the above-entitled case were mailed, first class postage, prepaid to Stuart J. Canale, Assistant United States Attorney, Western District of Tennessee, Western Division, 1026 Federal Office Building, Memphis, Tennessee 38103, Counsel for the Respondent. I further certify that all parties required to be served have been served.

Charles E. Waldman

Charles E. Waldman
147 Jefferson, Suite 1102
Memphis, Tennessee 38103

RESPONSE REQUESTED

No. 91-7814

Supreme Court, U.S.
FILED
JUL 8 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOHNNY LEE MUKES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

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RECEIVED
JUL 09 1992
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION PRESENTED

Whether the evidence was sufficient to support petitioner's conviction for using a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

No. 91-7814

JOHNNY LEE MUKES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 19-23) is unreported, but the judgment is noted at 952 F.2d 404 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1992. The petition for a writ of certiorari was filed on March 9, 1992. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted of possession of cocaine with the intent to distribute it, in

violation of 21 U.S.C. 841(a)(1) (Count 1), using a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1) (Count 2), and possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. 922(g) (Count 3). The district court sentenced him to concurrent terms of 180 months' imprisonment on Counts 1 and 3,[1/] and a consecutive term of 60 months' imprisonment on Count 2, to be followed by a three-year period of supervised release. C.A. App. 14-16. The court of appeals affirmed. Pet. App. 19-23.

1. On September 28, 1989, officers of the Memphis, Tennessee, Police Department executed a search warrant at 1040 Haynes Street in Memphis. They found petitioner, the only occupant of the house, in a rear bedroom. When the officers searched the bedroom, they discovered two plastic bags containing 32.9 grams of cocaine hidden in a sock in a dresser drawer. In the same drawer, the police also found a loaded .38 caliber Derringer pistol and an unloaded .25 caliber automatic pistol. Neither firearm was registered, and one of them had been stolen. A search of the kitchen of the house revealed several items of drug paraphernalia, including scales, a cooking tube used for converting powdered cocaine into crack cocaine, and small bags used for packaging drugs. After petitioner was advised of his rights, he admitted to the officers that the cocaine in the bedroom was his. Pet. App. 20; Gov't C.A. Br. 2-3.

2. The court of appeals affirmed. Pet. App. 19-23. The

1/ Petitioner's four prior felony convictions made him subject to an enhanced penalty on Count 3 under 18 U.S.C. 924(e). See C.A. App. 17-18.

court concluded that "a rational jury could have concluded that [petitioner's] drugs and the guns were being kept in the same place to facilitate the protection of the former by the latter." Pet. App. 21. Although possession of a drug with the intent to distribute it "'is in a sense a passive crime', * * * it is not analytically impossible for someone to use a gun in relation to the passive possession of drugs before the drugs are distribu-ted." Ibid. (quoting United States v. Bruce, 939 F.2d 1053, 1055 (D.C. Cir. 1991)). The court also observed that a drug dealer could "use" a firearm in relation to his drug crime by "keep[ing] a loaded weapon with his drugs for the purpose of protecting his inventory." Pet. App. 21.[2/]

ARGUMENT

Petitioner contends (Pet. 8-17) that the evidence was insufficient to show that he used a firearm during and in relation to a drug trafficking crime. That contention is without merit.

The evidence at trial was sufficient to permit a rational jury to conclude that petitioner "used" a firearm to facilitate his crime of possession of cocaine with intent to distribute it. Petitioner conceded that the 32.9 grams of cocaine discovered in the dresser drawer was his, and the evidence was clear that the same dresser drawer contained a loaded .38 caliber pistol and an unloaded.25 caliber pistol. The presence of two firearms, one of them loaded and ready to fire, in close proximity to a large

2/ The court of appeals rejected other contentions that petitioner has not renewed in this Court. Pet. App. 22-23.

quantity of illegal narcotics suggests that petitioner strategically placed the firearms so that they would be easily accessible for use during a drug transaction. Thus, there was a substantial nexus between the firearms and petitioner's crime of drug trafficking.

In addition to the court below, see Pet. App. 21, other courts of appeals have relied on the proximity between firearms and cocaine as evidence that the defendant intended to use the firearms for protection during a drug transaction. See United States v. Beverly, 921 F.2d 559, 563 (5th Cir.), cert. denied, 111 S. Ct. 2869 (1991); United States v. Moore, 919 F.2d 1471, 1475 (10th Cir. 1990), cert. denied, 111 S. Ct. 2812 (1991); United States v. Keene, 915 F.2d 1164, 1169 (8th Cir. 1990), cert. denied, 111 S. Ct. 1001 (1991); United States v. Robinson, 857 F.2d 1006, 1010 (5th Cir. 1988); see also United States v. Meggett, 875 F.2d 24, 28-29 (2d Cir.), cert. denied, 493 U.S. 858 (1989). Petitioner "used" the firearms because he kept them in a position to be available to protect his drug supply.

Contrary to petitioner's suggestion (Pet. 11), there is no conflict between the decision below and the decisions of the District of Columbia Circuit in United States v. Long, 905 F.2d 1572, 1578, cert. denied, 111 S. Ct. 365 (1990), the Second Circuit in United States v. Feliz-Cordero, 859 F.2d 250, 254 (1988), and the Eighth Circuit in United States v. Duke, 940 F.2d 1113, 1119 (1991). In Long and Feliz-Cordero, there was no evidence that the firearms in question were related to any of the drug trafficking

offenses charged in the indictments. The firearm in Long was unloaded and was found between the cushions of a sofa in a one-room apartment where Long's co-defendant lived. Although the apartment, in which Long and several other persons were arrested, contained drugs and drug paraphernalia, there was no evidence that Long had actually or constructively possessed the firearm, or that he even knew of its existence. 905 F.2d at 1576. Moreover, Long was not the owner or occupant of the apartment in which the firearm was found. The Long court accordingly concluded that the government had failed to show a sufficient nexus between Long and the firearm. Id. at 1577.

In Feliz-Cordero, the police found a firearm in a bedroom dresser drawer in an apartment in which drug records, about $11,000 in cash, a beeper, and a small amount of cocaine were also found. However, there was no evidence that any of the defendants processed or distributed drugs in that apartment; instead, they distributed cocaine from another apartment in the same building. The court of appeals reversed the defendants' convictions under Section 924(c)(1) upon finding that "there is no basis to conclude that the gun [in the bedroom dresser drawer] would have been quickly accessible if needed." Id. at 254.

In subsequent decisions, the Second Circuit has confirmed that its reversal of the conviction in Feliz-Cordero was based on "the absence of proof that the defendants * * * placed the weapon to have it available for ready use during the transaction." United States v. Meggett, 875 F.2d at 29; United States v. Torres, 901

F.2d 205, 217-218 (2d Cir.) (evidence that gun was found under mattress in apartment used for drug trafficking was sufficient to sustain conviction under Section 924(c)(1)), cert. denied, 111 S. Ct. 273 (1990); United States v. Alvaredo, 882 F.2d 645, 653, 654 (2d Cir. 1989) (upholding conviction based on evidence that guns were found in desk drawer and locked safe in apartment used for processing and selling cocaine), cert. denied, 493 U.S. 1071 (1990).

In United States v. Duke, supra, the Eighth Circuit upheld the defendant's conviction under Section 924(c)(1) and articulated a standard equivalent to the one used by the court in this case. The Long court noted that a weapon could be "used" in connection with a drug-trafficking crime even if it was not actually brandished or discharged. The "'presence and availability [of the firearm] in light of the evident need demonstrates the use.'" Duke, 940 F.2d at 1118, quoting United States v. La Guardia, 774 F.2d 317, 321 (8th Cir. 1985).

In the present case, the firearms (one of them loaded and ready to fire) were found in close proximity to a large quantity of cocaine owned by petitioner. The proximity of the firearms to a distribution-sized amount of cocaine in an area under the sole dominion and control of petitioner supplied the nexus that was present in Duke, but absent in Long and Feliz-Cordero. The facts in this case thus come within Long's requirement that a defendant must have actual or constructive possession of a firearm in order to "use" it, 905 F.2d at 1578-1579, and the requirement in Feliz-

Cordero that the gun be in such a location that it would have been quickly accessible if needed during a drug transaction, 859 F.2d at 254.[3/] The firearms were placed in a position to provide protection for petitioner's stash of cocaine. Because petitioner's conviction would be affirmed under the law of every circuit, there is no conflict in authority necessitating this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

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THOMAS M. GANNON
Attorney

JULY 1992

3/ We therefore disagree with the court of appeals' passing comment that the holding here is "difficult to reconcile" with Feliz-Cordero. Pet. App. 22.

SUPREME COURT OF THE UNITED STATES

JAMES EDWARD LANGSTON

91–7611 *v.*

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHNNY LEE MUKES

91–7814 *v.*

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 91–7611 AND 91–7814. Decided October 13, 1992

The petitions for writs of certiorari are denied.

JUSTICE WHITE, with whom JUSTICE THOMAS joins, dissenting.

In both of these cases, the petitioners contend that there was insufficient evidence to establish that they used a firearm during and in relation to a drug trafficking crime in violation of 18 U. S. C. § 924(c)(1).[1] In the course of searching Johnny Lee Mukes' house, officers found, in the top drawer of a nightstand in the bedroom, two plastic bags containing 32.9 grams of cocaine, a loaded .38 caliber derringer and an unloaded .25 caliber automatic pistol. *United States* v. *Mukes*, 952 F. 2d 404

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[1] 18 U. S. C. § 924(c)(1) provides:

> Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime, be sentenced to imprisonment for five years. . . .

These cases involve only the "use" prong of the statute.

(CA6 1992) (unpub.). When the police found James Edward Langston, he was standing at a table covered with cocaine base, six to eight feet from which was a loaded .38 caliber semiautomatic pistol hidden under a mattress. *United States* v. *Featherson*, 949 F. 2d 770 (CA5 1991).

The Courts of Appeals for the Fifth and Sixth Circuits, construing the term "uses" broadly, held that the jury could reasonably conclude that the presence of the firearms was connected to the trafficking in that they could protect the petitioners' merchandise. See also *United States* v. *Blake*, 941 F. 2d 334, 342–343 (CA5 1991); *United States* v. *Molinar-Apodaca*, 889 F. 2d 1417, 1424 (CA5 1989). Other courts have adopted the same approach. See, *e.g.*, *United States* v. *Wilkinson*, 926 F. 2d 22, 25–26 (CA1), cert. denied, 111 S. Ct. 2813 (1991); *United States* v. *Paz*, 927 F. 2d 176, 179 (CA4 1991); *United States* v. *Young-Bey*, 893 F. 2d 178, 181 (CA8 1990); *United States* v. *Martinez*, 967 F. 2d 1343, 1346–47 (CA9 1992); *United States* v. *Handa*, 943 F. 2d 55 (CA9 1991) (unpub.); *United States* v. *Poole*, 878 F. 2d 1389, 1393–94 (CA11 1989).

The petitioners insist that § 924(c) does not contemplate presuming an intent to use a firearm in relation to drug trafficking from the fact that a gun was found in the same room as drugs and related paraphernalia. The Sixth Circuit remarked that Mukes' position "has some support in case law from other circuits," and, in particular, cited the Second Circuit's decision in *United States* v. *Felix-Cordero*, 859 F. 2d 250, 254 (CA2 1988). See *Mukes*, *supra* ("[*Felix-Cordero*] is difficult to reconcile with our circuit precedent. . . . Insofar as there is a conflict, of course, and unless the Supreme Court or Congress should instruct us otherwise, we must follow our own precedents.").[2] Petitioners also rely on cases from the Third and D. C. Circuits. See *United States* v. *Bruce*, 939 F. 2d 1053, 1054–1056 (CADC 1991); *United States* v. *Theodoropoulos*, 866 F. 2d 587, 597–598 (CA3 1989). But see *United States* v. *Jefferson*, 1992 U. S. App. LEXIS 21614 (CADC 1992).

Because this issue arises with some frequency, and in light of the conflict in the Circuits, which shows no signs of abating, I would grant certiorari to clarify the meaning and scope of section 924(c).

[2] In *United States* v. *Jackson*, 924 F. 2d 1059 (CA6) (unpub.), cert. denied, 112 S. Ct. 97 (1991), the Sixth Circuit noted that some courts had held that "the 'in relation to' language of section 924(c) requires more than 'mere availability': the circumstances must suggest that the defendant intend to and be able to use the firearms during the offense. This, however, has not been the law of the Sixth Circuit."